Shahrunizam bin Mashkor & Anor v Public Prosecutor and another case

HIGH COURT (LABUAN) — CRIMINAL APPEAL NOS LBN-42A-1/11 OF 2012 AND LBN-42A-3/11 OF 2012 AND CASE NO LBN-42A-2/11 OF 2012
RAVINTHRAN J
19 AUGUST 2013

Criminal Law — Corruption — Abetment in submission of false claim — Appeal against conviction and sentence — Director at Jabatan Pengairan dan Saliran accused of abetting clerk in submitting claims in relation to non-existent projects — Whether prosecution case proven — Anti-Corruption Act 1997 s 20

Criminal Law — Corruption — Submission of false claim — Appeal against conviction and sentence — Clerk at Jabatan Pengairan dan Saliran accused of submitting claims in relation to non-existent projects — Whether prosecution case proven — Anti-Corruption Act 1997 s 11(c)

Criminal Procedure — Sentencing — Corruption — Sentencing principles — Amount involved — Abuse of position by government servants — Defrauded public purse — Director and clerk at Jabatan Pengairan dan Saliran accused of submitting claims in relation to non-existent projects — Whether 21 days imprisonment inadequate

Criminal Procedure — Trial — Close of prosecution case — Whether permissible for trial judge's findings at close of defence case to vary from his findings at close of prosecution case — Whether trial judge bound to follow his earlier ruling on admissibility of evidence

The first appellant was employed as a clerk in the Jabatan Pengairan dan Saliran ('JPS'). The second appellant was the director of JPS. The first appellant was charged under s 11(c) of the Anti Corruption Act 1997 ('the Act') with deceiving the government by submitting two false claims while the second appellant was charged under s 20 of the Act for abetting the first appellant. The charges related to river deepening projects at Sungai Batu Manikar and Sungai Miri in Labuan. In respect of the first charge which related to the Sungai Batu Manikar project, the first appellant faced a charge of submitting a false claim in the sum of RM16,500. In respect of the second charge which related to the Sungai Miri project, the amount was RM18,200. The river deepening works were never done. However, the appellants had approached PW13, a contractor,

to use his licence to make the false claims. The first appellant prepared the claims with the documents received from PW13 and the second appellant approved the claims. The first appellant claimed that she was ordered to process payments in question by the second appellant. She also said she received the cash sum of RM31,200 from PW13 and she was told by the second appellant to deposit it into his bank account. The second appellant claimed that he relied on the first appellant when he signed claim documents without checking the details. The second appellant claimed that he did not know that the monies had been deposited into his account. At the close of the case for the prosecution, the learned sessions court judge ('the judge') held that the prosecution failed to establish a prima facie case against both the appellants. Upon the prosecution's appeal, Justice David Wong Dak Wah ordered defence to be called. Justice David Wong Dak Wah held that the judge did not consider the significance of the documentary evidence, from PW13. The judge then heard the defence and at the end of the defence case the judge convicted the appellant. The judge imposed 21 days imprisonment and a fine of RM10,000 in respect of the two charges against the appellants. The appellants appealed against their convictions and sentence. The learned DPP submitted 21 days imprisonment was inadequate.

Held, dismissing the appeal against conviction and enhancing the sentence:

(1) The judge was correct to accept the evidence of PW13 at the close of the defence's case although at the end of the prosecution's case he rejected his evidence as evidence of an accomplice. This is because the issue of the credibility of PW13's evidence was dealt with by Justice David Wong Dak Wah who held that the judge had not considered crucial documentary evidence which corroborated his evidence and rendered it consistent and credible. Since the decision of the judge to reject PW13's evidence was reversed on appeal, the judge was not bound to follow his earlier ruling on this issue (see para 12).

(2) PW13 said that it was the first appellant who approached him with the suggestion to use his licence to obtain payment for a non-existent project. Justice David Wong Dak Wah found PW13 to be a credible and consistent witness because his testimony was supported by documentary evidence that indicated that the appellants accepted payment from him. Even if it is accepted that there was no corroboration, a conviction based on accomplice evidence in corruption cases cannot be set aside solely on the ground that the trial court failed to warn itself of the danger of convicting on such evidence (see para 15).

(3) The first appellant only banked in RM19,500 into the account of the second appellant through the ATM machine. Therefore a balance of RM11,700 which was not banked into the account of the second appellant must be presumed to be retained by the first appellant. Hence,

it was not wrong to infer that she benefitted financially. In any event, it was completely unreasonable that an experienced government officer like the first appellant could claim innocence in accepting a large sum of cash and rely on the dubious defence of following superior's orders (see para 19).

(4) There was ample evidence that the second appellant benefit financially from the payment for the said two non-existent projects. A sum of RM19,500 was deposited into his account. The second appellant's claim that he was not aware that the first appellant had deposited the money into his account was rejected by the judge correctly. The money that was deposited was higher than the normal salary payment into his account. Further the money was banked in at a time when his salary was not due. The second appellant had not bothered to inquire as to the source of the large deposit into his account. The second appellant also signed the payment vouchers in his capacity as head of department. Otherwise, the claim would not have been processed. Therefore, the second appellant had clearly abetted the offence of the first appellant (see paras 20–21).

(5) The amount involved in this case was relatively large, ie RM34,700. The appellants had abused their position to submit a claim for two non-existent projects. The judge failed to give sufficient consideration to public interest. The appellants had defrauded the public purse for their benefit. The punishment of 21 days imprisonment was no more that a rap on their knuckles. Hence, the term of imprisonment was enhanced to one year imprisonment for each of the two charges. The imprisonment terms are to run concurrently. The fine sentences are affirmed (see para 23).

[Bahasa Malaysia summary

Perayu pertama bekerja sebagai seorang kerani di Jabatan Pengairan dan Saliran ('JPS'). Perayu kedua merupakan pengarah JPS. Perayu pertama telah dipertuduh di bawah s 11(c) Akta Pencegahan Rasuah 1997 ('Akta') kerana menipu kerajaan dengan mengemukakan dua tuntutan palsu manakala perayu kedua dipertuduh di bawah s 20 Akta kerana bersubahat dengan perayu pertama. Pertuduhan-pertuduhan adalah berkenaan projek-projek pendalaman di Sungai Batu Manikar dan Sungai Miri di Labuan. Bagi pertuduhan pertama berkenaan projek Sungai Batu Manikar, perayu pertama menghadapi pertuduhan mengemukakan tuntutan palsu berjumlah RM16,500. Bagi pertuduhan kedua iaitu berkenaan projek Sungai Miri, jumlahnya adalah RM18,200. Kerja-kerja pendalaman sungai tidak pernah dilakukan. Walau bagaimanapun, perayu-perayu telah berjumpa dengan PW13, seorang kontraktor, untuk menggunakan lesennya bagi membuat tuntutan-tuntutan palsu tersebut. Perayu pertama telah menyediakan tuntutan-tuntutan dengan dokumen-dokumen yang diterima daripada PW13 dan perayu kedua telah meluluskan tuntutan-tuntutan tersebut. Perayu

pertama menghujahkan bahawa dia telah diarahkan untuk memproses bayaran-bayaran tersebut oleh perayu kedua. Dia juga menyatakan bahawa dia telah menerima sejumlah RM31,200 daripada PW13 and telah diberitahu oleh perayu kedua untuk mendepositkan kesemuanya ke dalam akaun bank perayu kedua. Perayu kedua menghujahkan bahawa dia bergantung pada perayu pertama semasa dia menandatangani dokumen-dokumen tuntutan tanpa memeriksa butir-butir. Perayu kedua menghujahkan bahawa dia tidak mengetahui bahawa wang tersebut didepositkan ke dalam akaunnya. Di penutup pendakwaan, hakim mahkamah sesyen ('hakim') telah memutuskan bahawa pihak pendakwaan gagal membuktikan kes prima facie terhadap kedua-dua perayu. Melalui rayuan pihak pendakwaan, Hakim David Wong Dak Wah memanggil pembelaan. Hakim David Wong Dak Wah memutuskan bahawa hakim tidak mempertimbangkan kepentingan keterangan dokumentar daripada PW12. Hakim perbicaraan kemudian mendengar pembelaan dan di hujung kes pendakwaan, hakim mensabitkan perayu. Hakim menjatuhkan hukuman penjara 21 hari dan denda RM10,000 bagi kedua-dua pertuduhan terhadap perayu-perayu. Perayu-perayu merayu terhadap sabitan dan hukuman. Pihak pendakwaan menghujahkan bahawa penjara 21 hari adalah tidak mencukupi.

Diputuskan, menolak rayuan terhadap sabitan dan meningkatkan hukuman:

(1) Hakim betul dalam menerima keterangan PW13 di hujung kes pendakwaan walaupun di hujung kes pendakwaan beliau menolak keterangannya sebagai keterangan subahat. Ini kerana isu kredibiliti keterangan PW13 telah dipertimbangkan oleh Hakim David Wong Dak Wah yang memutuskan bahawa hakim tidak mempertimbangkan keterangan dokumentari penting yang mana menyokong keterangannya dan memutuskan bahawa ia konsisten dan boleh dipercayai. Oleh kerana keputusan hakim untuk menolak keterangan PW13 telah diakas selepas rayuan, hakim tidak terikat untuk mengikut keputusannya yang terdahulu (lihat perenggan 12).

(2) PW13 menyatakan bahawa perayu pertama yang telah berjumpa dengannya dengan cadangan untuk menggunakan lesennya untuk mendapatkan bayaran bagi projek yang tidak wujud. Hakim David Wong Dak Wah mendapati bahawa PW13 adalah seorang saksi yang boleh dipercayai dan konsisten kerana keterangannya disokong oleh keterangan dokumentar yang menunjukkan bahawa perayu-perayu menerima bayaran daripadanya. Jikapun ia boleh diterima bahawa tidak terdapat sokongan, satu sabitan berdasarkan keterangan subahat dalam kes-kes rasuah tidak boleh diketepikan semata-mata kerana mahkamah bicara gagal untuk memperingatkan dirinya akan bahaya sabitan berdasarkan keterangan (lihat perenggan 15).

(3) Perayu pertama hanya memasukkan RM19,500 ke dalam akaun bank

perayu kedua melalui mesin ATM. Oleh itu, baki RM11,700 yang belum dimasukkan ke dalam akaun bank perayu kedua mesti dianggap telah dipegang oleh perayu pertama. Oleh itu, adalah tidak salah untuk menganggap bahawa dia telah menerima faedah kewangan tersebut. Dalam apa jua keadaan, adalah tidak munasabah untuk seorang pegawai kerajaan berpengalaman seperti perayu pertama boleh mendakwa dirinya tidak bersalah dalam menerima sejumlah tunai dan bergantung kepada pembelaan meragukan iaitu menurut perintah pihak atasan (lihat perenggan 19).

(4) Terdapat banyak keterangan bahawa perayu kedua menikmati faedah kewangan daripada bayaran bagi bayaran dua projek yang tidak wujud. Jumlah RM19,500 telah didepositkan ke dalam akaunnya. Dakwaan perayu kedua bahawa dia tidak sedar yang perayu telah memasukkan wang ke dalam akaunnya ditolak oleh hakim dengan betul. Wang yang didepositkan ke dalam akaun adalah lebih tinggi daripada bayaran gaji biasa. Selanjutnya, wang tersebut telah dimasukkan sebelum masa untuk gaji. Perayu kedua tidak cuba untuk bertanya mengenai sumber deposit yang besar dalam akaunnya. Perayu kedua juga menandatangani baucer-baucer pembayaran dalam kapasitinya sebagai ketua jabatan. Jika tidak, tuntutan tersebut tidak akan diproses. Oleh itu, perayu kedua jelas bersubahat atas kesalahan perayu pertama (lihat perenggan 20–21).

(5) Jumlah yang terlibat dalam kes ini agak besar iaitu RM34,700. Perayu-perayu telah menyalahgunakan kedudukannya untuk mengemukakan tuntutan bagi dua projek yang tidak wujud. Hakim gagal untuk memberi pertimbangan yang secukupnya mengenai kepentingan awam. Perayu-perayu telah menipu orang awam bagi faedah mereka sendiri. Hukuman penjara selama 21 hari adalah ringan buat mereka. Oleh itu, tempoh penjara ditingkatkan kepada satu tahun bagi setiap pertuduhan. Tempoh penjara berjalan serentak. Hukuman-hukuman denda disahkan (lihat perenggan 23).]

Notes

For cases on corruption, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4104–4123.

For cases on close of prosecution case, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5364–5434.

Cases referred to

Abdul Karim bin Kula v PP [2009] MLJU 1279; [2009] 10 CLJ 1, HC (refd)

Hj Abdul Rahim Hassan & Anor v PP [1997] MLJU 238; [1997] 4 CLJ Supp 381, HC (refd)

Sharma Kumari a/p Oam Parkash v PP [2000] 6 MLJ 790, HC (refd)

Legislation referred to

Anti Corruption Act 1997 (repealed by the Malaysian Anti-Corruption Commission Act 2009) ss 11(c), 20, 44, 44(2)
Evidence Act 1950 s 47

Sugumar Balakrishnan (Sugumar & Co) for the first appellant.
Rakhbir Singh (Rakhbir Singh & Co) for the second appellant.
Joyce Blasius (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Ravinthran Paramaguru J:

INTRODUCTION

[1] These are appeals by two appellant persons against their convictions and sentence on two charges and the cross-appeals by the prosecution on sentence. Rahimah bt Abdul Rashid and Shahrunizam bin Mashkor were charged in separate cases. Rahimah bt Abdul Rashid faced two charges of deceiving the government by submitting a false claim and Shahrunizam bin Mashkor faced two corresponding charges of abetment. A joint trial was ordered by the court. I shall refer to Rahimah bt Abdul Rashid as the first appellant and Shahrunizam bin Mashkor as the second appellant. They were represented by Mr Sugumar Balakrishnan and Mr Rakhbir Singh respectively.

BRIEF FACTS

[2] The first appellant was employed as a clerk in the Drainage and Irrigation Department of Labuan (Jabatan Pengairan dan Saliran or 'JPS'). The director of the JPS was the second appellant. The charges against both appellants related to river deepening projects at Sungai Batu Manikar and Sungai Miri in Labuan. The first appellant was charged with deceiving the Government of Malaysia by submitting two false claims while the second appellant was charged for abetting the first appellant in respect of the said two false claims. In respect of the first charge which related to the Sungai Batu Manikar project, the first appellant faced a charge of submitting a false claim in the sum of RM16,500 to deceive the Government of Malaysia. In respect of the second charge which related to the Sungai Miri project, the amount stated in the charge was RM18,200. The charges against the first appellant are under s 11(c) of the Anti Corruption Act 1997. The relevant limb of s 11(c) reads as follows:

> (c) any person knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,

he shall be guilty of an offence.

[3] The essential elements of the offence under s 11(c) are:

(a) that the first appellant is an agent;

(b) that first appellant used a document in which their principal is interested;

(c) that the document is false; and

(d) and that the first appellant persons knew that it is false and that it is intended to mislead her principal.

[4] The second appellant is charged with abetting the first appellant under s 20 of the Anti Corruption Act 1997. The case of the prosecution was that the river deepening works at Sungai Batu Manikar and Sungai Miri were never done. However, the first appellant approached PW13 who runs a firm known as Norlies General Contractor to use his licence to make a false claim. After she had obtained the relevant documents from PW13, she proceeded to prepare the claims. The second appellant abetted the offence by signing on the claims. It is also the prosecution's case that both appellants shared the proceeds of the false claim after giving 10% of it to PW13.

PREVIOUS APPEAL HISTORY

[5] At the close of the case for the prosecution, the learned sessions court judge held that the prosecution failed to establish a prima facie case in respect of charges against both first and second appellant. The prosecution appealed against the said decision. Justice David Wong Dak Wah ordered defence to be called. His Lordship noted in his written grounds of decision that the main reason of the sessions court judge for not calling for the defence is the role played by PW13, the alleged contractor in his whose name the claims in question were made. His Lordship noted as follows:

> Having read the grounds of the learned sessions court judge, it can be said that he found PW13 to be a witness with no credibility. He initially held that PW13 should be treated as an accomplice to the whole scheme of thing on grounds:
>
> (a) PW13 ought to have known and in fact knew that it was illegal for him to lend his license to the first respondent to do renovation works at the two rivers.
>
> (b) The invoices submitted to Jabatan Pengairan dan Saliran were that of PW13.
>
> (c) PW13 himself knew that there was no renovation works done to the two rivers.
>
> (d) The payment for the alleged works went directly to PW13's bank account.

[6] Justice David Wong Dak Wah then proceeded to hold that the sessions court judge did not consider the significance of the documentary evidence, ie P12, P17 and P18 (1–13). P12 is a payment voucher dated 19 March 2008 from the firm of PW13, ie Norlies General Contractor. It is addressed to the first appellant. The sum stated in the payment voucher is RM31,200 which was paid to the first appellant personally. The first appellant signature appears in the signature column as the recipient. PW18 who is a colleague of the first appellant identified the signature. His evidence is admissible under s 47 of the Evidence Act 1950. P17 and P18(1) are deposit slips of payment made to the account of the second appellant after 19 March 2008. Justice David Wong Dak Wah then held as follows in respect of the significance of the above documents:

> It is my view that had the learned sessions court judge taken those documentary evidence into consideration, he would have come to a different conclusion and that conclusion is that the evidence of PW13 is credible as it is consistent and in fact corroborated by the presence of first 15 respondent's signature on P12 and numerous payments to the second respondent. The documentary evidence in my view provide the missing parts to the jigsaw parcel or put it in another way it ties up the story of PW13 neatly.

[7] In accordance with the direction of the High Court to call for defence, the sessions court judge heard the defence of the appellants.

FINDING OF SESSIONS COURT JUDGE AT THE END OF THE DEFENCE CASE

[8] The two appellant persons blamed each other when they took the witness stand. The first appellant told the court that she was ordered to process payments in question by the second appellant who is her superior officer. She said that she did not know if the project was completed. She said that she did not know the department budget for that year. She also said she received the cash sum of RM31,200 from PW13 but she was told by the second appellant to deposit it into his bank account. It is significant that she received the first installment on the same day that Norlies General Contractor received payment for the said two river deepening projects from the Jabatan Akauntan Negara in the sum of RM16,500 and RM18,500 for the said two non-existent projects. The first appellant also told the court that she received another RM5,000 from PW13 for payment of office blazers. The second appellant allegedly told her to accept the said RM5,000 from PW13.

[9] The defence of the second appellant is that he normally relied on his subordinates when he signed claim documents. In the instant case, he relied on first appellant as she prepared the claim documents pertaining to the two river deepening project. He did not bother check the details. The second appellant also said he does not know PW13 and did not know that the said monies had

been deposited into his account. He said that the first appellant knew his account number and had banked in the money through the ATM machine. He did not check his account and therefore was not aware of what she had done. Thus the first and second appellant had pointed the finger of accusation at each other for the offences they were charged with.

[10] After considering the submissions of their counsel, the learned sessions court judge convicted the first and second appellant of the charges in question. He said that there was unchallenged evidence that the river deepening projects were not completed. He rejected the evidence of the first appellant that she was not aware of the JPS budgetary allocations. He made a finding that she was the only officer from the Finance Section who assisted the second appellant as the 'Pegawai Pengawal'. He also considered the evidence that the first appellant attended numerous finance courses to process payment. He said that her evidence that she did not know if the projects were completed could not be accepted. There were no 'photographs' submitted as supporting documents. The sessions court judge said that she purposely did not inquire if the projects were not completed because she knew they were non-existent. Therefore he did not accept her defence that she acted under the instruction of the second appellant. He also considered the fact that she signed the payment voucher and accepted RM31,200 from PW13 as damning. Similarly, he rejected the defence of the second appellant that he was not aware that the project was not completed because the payment documents were prepared by the first appellant. He also found that the second appellant cannot claim ignorance of the monies that were deposited into his bank account as the amounts were higher than his monthly salary. However, the second appellant never inquired as to the source of these deposits.

GROUNDS OF APPEAL OF THE FIRST APPELLANT

Evidence of PW13

[11] The first and major ground of appeal relates to the role of PW13 and the initial finding of the sessions court judge that he is a principal wrongdoer. This ground was also raised by counsel for second appellant. Counsel for first appellant submitted that as PW13 played a major role, his evidence should be disregarded and that s 44 of the Anti Corruption Act 1997 has no application. He further submitted that the sessions court judge ought to have:

(a) invoked the presumption of adverse inference against the prosecution by disregarding the evidence of PW13;

(b) required corroboration of PW13's evidence;

(c) warned himself of the danger of convicting the first appellant on the evidence of an accomplice.

[12] The above points were also echoed by counsel for second appellant. In my opinion, the learned sessions court judge was correct to accept the evidence of PW13 at the close of the defence's case although at the end of the prosecution's case he rejected his evidence as evidence of an accomplice. This is because the issue of the credibility of PW13's evidence was dealt with by Justice David Wong Dak Wah who held that the sessions court judge had not considered crucial documentary evidence which corroborated his evidence and rendered it consistent and credible. Since the decision of the sessions court judge to reject PW13's evidence was reversed on appeal, the sessions court judge was not bound to follow his earlier ruling on this issue. In the case of *Sharma Kumari a/p Oam Parkash v Public Prosecutor* [2000] 6 MLJ 790 which was cited by the learned deputy public prosecutor, Abdul Wahab J said that the rulings on law of the High Court which had ordered defence to be called were binding on the magistrate:

> The third and last submission dealt with by Mr Athimulan is that the learned magistrate never considered or evaluated all the evidence before arriving at a just decision.
>
> ... Now, in this case the second magistrate heard the defence witnesses. The defence application under s 261 was rejected, and there was no subsequent application under s 173(j)(3) or s 425 of the CPC. She was not called upon to review any new or fresh evidence from prosecution witnesses that the first magistrate or the High Court in the appeal had no access to, as might change the weight, value or effect of the evidence on record of the prosecution witnesses. As in *Datuk Tan Cheng Swee*'s case and *Mohd Jalani bin Saliman & Anor v PP* [1997] 5 MLJ 551, it was therefore unnecessary for her to traverse all the arguments and rulings again since with regard to the facts in the prosecution stage of the case, she was in no better position than the High Court which had ordered to call for the defence. *She could not in any case ignore the High Court decision*.
>
> (Emphasis added.)

[13] In the instant case, the High Court had ordered defence to be called. The prosecution did not tender any fresh evidence in support of its case. The central ground of the High Court was that the sessions court judge did not give sufficient consideration to the documentary evidence that corroborated the testimony of the star witness, ie PW13. Since the defence was ordered to be called by the High Court, it means that the evidence is sufficiently strong to convict the appellant persons if they remained silent. It also means that the evidence had been subjected to a maximum evaluation. The task of a trial judge in a criminal case at the end of the case for the defence is to determine whether there is a reasonable doubt on the whole of the case. In this exercise, he must consider the entire evidence adduced. However, he is not obliged to 're-evaluate' the evidence tendered at the close of the prosecution's case as that would involve re-visiting findings of fact that were relevant for holding that there was a prima facie case. In *Abdul Karim Bir Kula v Public Prosecutor*

[2009] MLJU 1279; [2009] 10 CLJ 1, the argument that the trial court did not 're-evaluate' the prosecution's evidence at the close of the case for the defence was rejected. Abdul Rahman Sebli JC said as follows:

> The appellant's complaint is that in rejecting the defence case the learned trial judge failed to comply with s 182A(1) of the Code in that she did not 're-evaluate' the prosecution evidence in deciding whether the prosecution had proved its case beyond reasonable doubt. It was contended that there is a possibility the appellant signed blank LPOs as claimed by him in his defence. With due respect I do not think the duty imposed by s 182A(1) of the Code is for the court to re-evaluate the prosecution's evidence. What the section requires is for the court to consider the entire evidence and determine whether the evidence presented by the defence has cast a reasonable doubt in the court's mind as to the truth of the prosecution case. This is actually a codification of the procedure laid down by Suffian J (as he then was) in *Mat v PP* [1963] 1 LNS 82.
>
> [34] The need to re-evaluate the prosecution's evidence does not arise because at the end of the prosecution's case the prosecution's evidence had been subjected to a maximum evaluation and the witnesses found to be credible witnesses: *PP v Ong Cheng Heong* [1998] 4 CLJ 209; *PP v Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; *Balachandran v PP* [2005] 1 CLJ 85; *PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457.

[14] In the instant case, the sessions court judge had rejected the evidence of PW13 at the close of the case for the prosecution. The High Court had ordered him to call for defence after determining that the sessions court judge would have decided otherwise if he had considered the documentary evidence. In the premises, if the sessions court judge had ignored PW13's evidence at the end of the case for the defence, it is tantamount to reversing the judgment of the High Court that ordered defence to be called. In respect of the argument that PW13 required corroboration, Justice David Wong Dak Wah held in his written judgment that the documentary evidence, ie the payment voucher received by the first appellant and the deposit slips that are evidence of payment into the account of the second appellant, 'ties up the story of P.W. 13 neatly'. As for the requirement of warning that the sessions court judge should have warned himself of the danger of accepting the evidence of PW13 who he held to be accomplice, it is only applicable in general criminal cases. Section 44(2) of the Anti Corruption Act 1997 reads as follows:

> (2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or *agent provocateur* shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

[15] It must be recalled that PW13 said that it was the first appellant who approached him with the suggestion to use his licence to obtain payment for a non-existent project. The High Court on appeal found PW13 to be a credible and consistent witness because his testimony was supported by documentary evidence that indicated that the first appellant and second appellant accepted payment from him. However, even if it is accepted that there was no corroboration, a conviction based on accomplice evidence in corruption cases cannot be set aside solely on the ground that the trial court failed to warn itself of the danger of convicting on such evidence.

Failure to call Izzuan

[16] The learned sessions court judge held that at the close of the prosecution's case that the failure to call Izzuan by the prosecution was fatal. This was one of the grounds on which he acquitted the appellant persons. Izzuan is an officer with the Jabatan Akauntan Negara ('JAN'). It was JAN that approved payment for the said river deepening projects upon receipt of the claim forms from the JPS which were signed by the first and second appellant. The evidence of another officer of the JAN is relevant on this point. PW14 is the JAN officer who actually approved the payment. PW14 said that before he received the payment vouchers for the said projects, ie P10 and P11, another officer by the name of Izzuan had checked them. Izzuan was not called as a witness. It is for this reason that the sessions court judge had earlier ruled that there was a gap in the prosecution's case. In my view, since the High Court had ordered defence to be called, the sessions court judge is not bound by his own finding about the gap in the prosecution's case on this account. In any event, I am of the view that this point is without any significance. The role of Izzuan was merely to check P10 and P11 before passing it for approval to PW14. Furthermore, as submitted by the learned DPP there is no suggestion that the P10 and P11 were tampered with in the course of transmission. Both first and second appellant had admitted signing it. The defence of the first appellant was that she was following the instruction of the second appellant whereas the defence of the second appellant was that he signed whatever that was prepared by the first appellant without checking the details. In the premises, evidence from Izzuan would not have been necessary to fill any 'gap' in the prosecution's case.

Knowledge of location of the two rivers

[17] In the first ruling, the sessions court judge held that there was no evidence to show that the first appellant knew where the two rivers were and whether the first appellant knew who certified the works on the two rivers which had been done. Knowledge of the location of the rivers is not relevant in

this case. The charge is that the appellant had used documents that contained false particulars to make a claim for non-existent projects.

Issue of receipt of RM5000

[18] Counsel for first appellant attacked the finding of the sessions court judge in respect of the acceptance of the sum of RM5000 by the first appellant from PW13. The first appellant had testified that she received the sum of RM5000 on the instruction of the second appellant for payment of office blazers. The sessions court judge held that 'even though his money of RM5000 is not directly connected with the case but the receipt of the money is relevant to show the relationship between the 1st appellant and the contractor and 2nd appellant'. I see nothing wrong in this finding as it shows that PW13, the first appellant and second appellant dealt with each other. It must be noted that the second appellant had said that he does not know PW13. However, the sessions court judge did not hold that the sum of RM5000 was related to the projects in question as submitted by counsel for first appellant. The sessions court judge only referred to the cash payment made on 19 March 2008 vide P12 to the first appellant which was later banked into the bank account of the second account as a benefit received by the appellants for the projects in question. Thus I see no merit in the ground that the sessions court judge wrongly took into account the acceptance of RM5000 by the first appellant.

Monetary benefit

[19] Counsel for first appellant submitted that the prosecution failed to prove that the first appellant received any financial gain in respect of the two projects. As submitted by the DPP, receipt of financial reward is not an ingredient of the offence in question. There is no requirement to prove acceptance of gratification for this offence (see *Hj Abdul Rahim Hassan & Anor v Public Prosecutor* [1997] MLJU 238; [1997] 4 CLJ Supp 381 which was cited by the DPP). However, the first appellant admitted receiving cash in the sum of RM31,200 as stated in P12 from PW13. PW13 told the court that the first appellant requested the payment on the day that JAN paid him RM34,700 for the two purported river deepening projects. By paying the first appellant the sum of RM31,200, PW13 had retained for himself RM3470 which the prosecution submitted is his 10% commission for allowing his contractor licence to be used. The evidence tendered by the prosecution is that the first appellant only banked in RM19,500 into the account of the second appellant through the ATM machine. Therefore a balance of RM11,700 which was not banked into the account of the second appellant must be presumed to be retained by the first appellant. Therefore, it is not wrong to infer that she benefitted financially. In any event, it is completely unreasonable that an experienced government officer like the first appellant could claim innocence

in accepting a large sum of cash and rely on the dubious defence of following superior's orders.

ADDITIONAL GROUNDS RAISED BY COUNSEL FOR SECOND APPELLANT

[20] Counsel for second appellant submitted that the offences in question were committed by the first appellant and PW13 only. In my view the learned sessions court judge correctly dismissed this defence. There is ample evidence that the second appellant benefit financially from the payment by the JAN for the said two non-existent projects. The prosecution tendered evidence that a sum of RM19,500 was deposited into the account of the second appellant. The second appellant told the court that he was not aware that the first appellant had deposited the money into his account. This was rejected by the sessions court judge correctly. The money that was deposited is higher than the normal salary payment into his account. Further the money was banked in at a time when his salary was not due. The second appellant had not bothered to inquire as to the source of the large deposit into his account. The first appellant also told the court that the second appellant requested her to deposit the money into his account. The second appellant as head of department certified that the project was completed. In the premises, the argument that the offence was only committed by the first appellant and PW13 is without merit.

[21] Counsel for second appellant submitted that the second appellant had perfunctorily signed the claim documents without inquiring. This defence was correctly rejected. The two projects are in respect of the river deepening projects that come under the Unit Pantai. The second appellant had not bothered to inquire the status of the projects from the Unit Pantai. The usual photographs (*laporan bergambar*) were not tendered as supporting documents either for the claim. Therefore, the second appellant should have been put on inquiry. He did not inquire and the obvious reason is that he knew all along that the projects did not exist and he received a monetary benefit to certify the project. Therefore, the submission of counsel for second appellant that the second appellant had 'administratively signed' the payment vouchers is not tenable. The second appellant also told the court that he was directed (*diarahkan*) by the first appellant to sign the payment vouchers. This is unlikely as the second appellant was the superior officer as the director of the JPS. The second appellant also signed the payment vouchers in his capacity as head of department. Otherwise, the claim would not have been processed. Therefore, the second appellant had clearly abetted the offence of the first appellant.

CONCLUSION

[22] In my opinion, none of the grounds raised in the petition of appeal and the submissions of counsel justify overturning the decision of the sessions court. The learned sessions court judge had correctly considered the grounds canvassed before convicting the accused persons. I shall therefore affirm the conviction of the two appellants in respect of both charges.

[23] The sessions court judge imposed 21 days imprisonment and a fine of RM10,000 in respect of the two charges against the appellants. He ordered the imprisonment terms to run concurrently. The learned DPP submitted 21 days imprisonment is inadequate whereas the counsel for appellants submitted that it was excessive. The maximum punishment is 20 years imprisonment and fine. In my view, the learned sessions court judge was overly sympathetic to the appellants in imposing only 21 days imprisonment. The amount involved in this case is relatively large, ie RM34,700. The appellants had abused their position to submit a claim for two non-existent projects. The learned sessions court judge failed to give sufficient consideration to the public interest. The appellants had defrauded the public purse for their benefit. The punishment of 21 days imprisonment is no more that a rap on their knuckles for the said corruption offences which involved a large amount of money. Therefore I shall dismiss all the appeals against conviction and enhance the term of imprisonment of 21 days to one year imprisonment for each of the two charges in respect of which the appellants were convicted. The imprisonment terms are to run concurrently. The fine sentences are affirmed.

Appeal against conviction dismissed and sentence enhanced.

Reported by Kanesh Sundrum